SUPREME COURT, U. S.

DEC 11

IN THE

Supreme Court of the United States

No. 73-915

JUAN MORAN,

Petitioner,

vs.

THE RAYMOND CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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No.

JUAN MORAN,

Petitioner,

VS.

THE RAYMOND CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Juan Moran, plaintiff below, prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on September 14, 1973, reversing judgment of the United States District Court for the Northern District of Illinois entered for the plaintiff based upon a jury verdict in the sum of $250,000.00.

OPINION BELOW.

The opinion of the Seventh Circuit Court of Appeals as yet is unpublished in the official reporters. The Slip Opinion is reproduced in the Appendix hereto. Reference to the opinion shall be made as "Op. A . . ."

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1). The judgment of the court of appeals was entered on September 14, 1973. This petition for Writ of Certiorari is being filed within 90 days of the entry of judgment by the court of appeals.

QUESTIONS PRESENTED.

1. Whether under the provisions of Rule 50(b) of the Federal Rules of Civil Procedure the court of appeals was empowered to re-examine the evidence and enter judgment notwithstanding the verdict where the defendant had failed to move orally or in writing for a directed verdict at the close of all the evidence.

2. Whether the court of appeals violated plaintiff's right to trial by jury preserved by the Seventh Amendment of the United States Constitution in re-examining a fact specifically determined by the jury in its answer to special interrogatories and, also, in the general verdict.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

United States Constitution:

AMENDMENT VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50(b) of the Federal Rules of Civil Procedure provides in part that:

> "Whenever a motion for directed verdict made at the close of all the evidence is denied . . . the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion."

STATEMENT OF THE CASE.

1. Proceedings Before the District Court.

A verdict was rendered in favor of plaintiff, Juan Moran, and judgment entered thereon in the sum of $250,000.00 for injuries to his arm as a result of the allegedly defective and unreasonably dangerous design of a fork lift truck manufactured by defendant, The Raymond Corporation. The trial was conducted on Count II of the Complaint, based on the doctrine of strict liability against the manufacturer of a defective product. The evidence showed that Raymond manufactured a lift truck known as a sideloader which was designed to operate in narrow aisles. On one end of the equipment there is located an operator's cage with the controls inside. Juan Moran was a native of Mexico who spoke little English. He had been employed at Central Steel and Wire Company in Chicago operating lift-trucks for approximately three months. On the night of his injury, he had worked several hours and was in the process of returning a tray full of steel rods which he had erroneously removed earlier to a rack approximately eight or nine feet above the ground. This was the first night he had used the particular machine manufactured by defendant. At this time several of the rods fell from the tray onto the forks. Moran, seeking to replace the rods in the tray, went to the front of the machine. He encountered considerable difficulty in achieving this result, and desired to lower the tray so that it could be put into a lower position in the rack. To do so, he reached the control lever and pulled it downward. He tried to bring his hand back, but it became stuck on a metal piece which caught a bandage he had on his wrist. Being unable to withdraw his arm, the crossbar proceeded downward with a shearing action, causing Moran to suffer serious injury and permanent paralysis to his right arm.

The evidence was that the defendant failed to incorporate a grate or guard in front of the control area. Additionally de-

fendant had failed to provide a self-neutralizing control lever tc lower the forks. These two conditions were stated to be in violation of accepted industry safety standards and were the proximate cause of injury to the plaintiff.

The law applicable to the case is the doctrine of strict liability in tort. It provides that a manufacturer of an unreasonably dangerous and defective product is liable to a person injured as a result of the defect. The defenses available to this doctrine of liability are: (a) assumption of the risk, and (b) misuse of the product. Under the law of the forum, Illinois, the defense of assumption of the risk is an affirmative one where the burden of proof is upon the defendant. Assumption of the risk is defined as knowingly and unreasonably proceeding to encounter a danger. In determining whether the defense has been proved the subjective test is applied to find if the injured person possessed the requisite degree of knowledge, understanding and appreciation of the danger.

Williams v. *Brown Manufacturing Co.*, 45 Ill. 2d 418, 261 N. E. 2d 305 (1970).

Sweeney v. *Matthews*, 46 Ill. 2d 64, 264 N. E. 2d 170 (1970).

2. Motion Made at Close of Plaintiff's Case.

At the close of plaintiff's evidence, the defendant presented a general written motion for directed verdict. Orally, defendant's argument was limited to the defense of assumption of the risk. The court reserved ruling on the motion, and defendant then proceeded to introduce its evidence. This evidence consisted of six witnesses and several exhibits, encompassing 110 pages of the record. Plaintiff cross-examined all of defendant's witnesses, showing the inadequacy of training and instruction in the operation of the lift truck, and the absence of appropriate printed warnings on the machine. Plaintiff cross-examined defendant's design engineer establishing the fact that it was contemplated

that operators of the machine would frequently be doing what the plaintiff was at the time of his injury. Further, that operators would often have need to move the forks while working at the front of the machine as Moran had done. The cross-examination was directed at establishing that Moran did not assume the risk of his own injury in that his understanding and appreciation of the danger were insufficient and that he did not act unreasonably under the circumstances.

3. No Motion Was Made at the Close of All the Evidence.

At the conclusion of the defendant's case, the parties both rested. No action was taken by the defendant at any time to enter a motion for directed verdict at the close of the evidence nor to renew its motion made at the close of the plaintiff's case. On the contrary, defendant's counsel tendered special interrogatories to be submitted to the jury. In these interrogatories the identical issues originally raised by its motion at the close of plaintiff's case were to be specifically considered and answered by the jury. In support of unconditionally submitting these special issues to the jury, he stated to the trial judge:

> ". . . I think that these are questions directed to the heart of the Defendant's defense, and an affirmative answer to either one would control the general verdict that might be entered for the Plaintiff perhaps on the ground of sympathy or something of that nature because of a severe injury, or the presence of the corporate defendant. So I think it is necessary *to get to the truth of the matter* to submit these." (C. A. A. 302) (emphasis supplied)

4. Affidavits Filed in Court of Appeals.

Defendant's trial counsel filed an affidavit with the court of appeals, alleging that he privately told the trial judge, who is now deceased, that:

> ". . . he had a motion for a directed verdict at the close of all of the evidence that he would like to have filed." (Op. A3)

He claimed that this allegation took place off the record in chambers, and he was not certain if plaintiff's trial counsel was present to hear his remarks. On oral argument in the court of appeals, defendant's trial counsel asserted that this alleged conversation may have occurred in a period of a few seconds when he walked to the judge's chambers while plaintiff's counsel was still in the courtroom conferring with the plaintiff.

Plaintiff's counsel filed his affidavit in the court of appeals stating that no such conversation occurred and he was not aware of any contention by the defendant that it desired to file a motion at the close of the evidence.

Defendant's assertion did not claim that an oral motion was made in this private conversation. It did not contend that it moved to renew the prior motion. The affidavit simply states that defendant's counsel told the judge he would like to file a motion but the record shows he never did so orally or in writing.

The jury was instructed on the law of the case, including the affirmative defenses of assumption of the risk and misuse. The trial court then submitted defendant's two special interrogatories to the jury, inquiring of them whether plaintiff had assumed the risk of his injury, and, secondly, whether he had misused the lift truck. The jury returned its general verdict for the plaintiff and responded to each interrogatory that the plaintiff had neither (a) assumed the risk, nor (b) misused the product.

REASONS FOR GRANTING WRIT.

A.

The decision of the court of appeals in this case abandoning the requirement of a motion for directed verdict at the close of all the evidence is in direct conflict with all prior decisions of the Circuit Courts of Appeals, interpreting Rule 50(b) of the Federal Rules of Civil Procedure. It is also in direct conflict with a decision of this Court and with principles announced by this Court in prior cases. The opinion of the court of

appeals admits to confusion and "ambivalency" (Op. A6) in the meaning of the decisions of the other circuits interpreting Rule 50(b). The conflict and confusion here relate directly to an important question of procedure, applicable to all federal civil litigation. A determination by the Court of this issue is vital to the administration of justice in the federal system.

B.

The decision by the court of appeals is in conflict with decisions of this Court relating to the historic function of the jury under the Seventh Amendment of the Constitution of the United States. The decision is similarly in conflict with decisions of the Supreme Court of Illinois which determined the substantive law of the case. Further, the decision deviates from the accepted conduct of judicial proceedings respecting the fact-finding role of the jury. To the extent that this decision departs from case authority in this Court and in the high court of Illinois, it is urged that the Court exercise its supervisory authority to preserve and reaffirm the constitutional right of the petitioner in the instant case and to others in cases hereafter litigated in the federal courts.

ARGUMENT.

A.

THE COURT OF APPEALS ERRONEOUSLY ABANDONED THE REQUIREMENTS OF RULE 50(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE THAT A MOTION FOR DIRECTED VERDICT BE MADE AT THE CLOSE OF THE EVIDENCE TO AUTHORIZE THE REVIEWING COURT TO ENTER JUDGMENT N. O. V.

The decision of the court of appeals totally departs from the well settled interpretation of Rule 50(b) F. R. C. P. This rule requires that a motion for directed verdict must be made either orally or in writing at the close of all the evidence. This must be done as an indispensable prerequisite for examining the sufficiency of evidence on appeal and to enable the reviewing court to enter judgment n. o. v.

This Court has held that the procedural requirements of Rule 50(b) must be strictly complied with in order to permit an appellate court to order judgment n. o. v. In *Neely* v. *Eby Construction Co.*, 386 U. S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75, the court stated:

> "The opinions in the above cases make it clear that an appellate court may not order judgment n. o. v. where the verdict loser has failed *strictly to comply* with the procedural requirements of Rule 50(b) . . ." (p. 325) (Emphasis supplied)

All of the courts of appeals which have dealt with this issue have held that it is necessary to make a motion for directed verdict at the close of *all* the evidence, since the party is deemed to have waived a motion made at the close of his opponent's case when he thereafter produces defensive evidence.

O'Malley v. *Cover*, 221 F. 2d 156 (8th Cir.).

Home Insurance Co. of New York v. *Davilla*, 212 F. 2d 731 (1st Cir.).

United States v. *Kaiser*, 138 F. 2d 219 (7th Cir.).

Little v. *Bankers Life and Casualty Co.*, 426 F. 2d 509 (5th Cir.).

Frontier Air Lines, Inc. v. *Sky Chefs, Inc.*, 447 F. 2d 1351 (5th Cir.).

Werner v. *Kewanee Machinery & Conveyer Co.*, 411 F. 2d 1060 (C. A. Mich.), Cert. Den. 90 S. Ct. 6185, 398 U. S. 906, 26 L. Ed. 2d 65.

Gillentine v. *McKeand*, 426 F. 2d 717 (1st Cir.).

Continental Air Lines, Inc. v. *Wagner-Morehouse, Inc.*, 401 F. 2d 23 (7th Cir.).

Wegner v. *Rodeo Cowboys Assn., Inc.*, 417 F. 2d 881 (C. A. Colo.), Cert. Den. 90 S. Ct. 1688, 398 U. S. 903, 26 L. Ed. 2d 60.

Authorities on federal practice and procedure have similarly stated this to be the rule.

> *Moore on Federal Practice*, Vol. 5A, Section 50.05 (1), p. 2341, Section 50.08, pp. 2357, 2358.
>
> *9 Wright & Miller, Federal Practice and Procedure: Civil*, Section 2536, p. 593.

The reason for the rule has been stated to be:

> "To ask the court to enter a judgment contrary to a general verdict of the jury where no motion for a directed verdict has been interposed is simply to ask the court to re-examine the facts already tried by the jury, and this the court may not do without violating the Seventh Amendment." *Mutual Benefit Health and Accident Assn.* v. *Thomas*, 123 F. 2d 353, 355 (C. C. A. 8th).

In the instant case the opinion of the court of appeals relies on two decisions which it contends reflects a trend toward liberality in the application of Rule 50(b). These cases are *Bayamon Thom McAn, Inc.* v. *Miranda*, 409 F. 2d 968 (1st Cir., 1969), and *United States* v. *353 Cases*, 247 F. 2d 473 (8th Cir., 1957). In each of these cases the courts were persuaded that the evidence adduced by the defendant was brief and insubstantial. The evidence did not address itself to the merits and occupied only a page or two of testimony unrelated to the defenses raised in the motion. The court, in each of these cases, viewed the evidence as if the defendant had not proceeded and had rested, relying upon his earlier motion. The court of appeals in the instant case acknowledges in its opinion that *such is not the situation here*. The court points out that the defendant put on six witnesses in its case in chief. This testimony encompassed 110 pages of the record, all of which was directed to the merits of defendant's affirmative defense.

The court of appeals here admits to an "ambivalency" (Op. A6), arising from the opinions in the *McAn* and *353 Cases*, regarding the brief and inconsequential nature of the defensive testimony. To resolve this "ambivalency", the court creates

a new and radical test based upon its interpretation of the *effect* of defendant's evidence during its case in chief. The court concludes that:

> "If on analysis the additional evidence, even though extensive, accomplishes what the defendant intended it should, i.e., strengthening his case without simultaneously exposing a flaw . . . (then it would be to) "enshrine form over substance" . . . (to deny the authority of the court of appeals to re-examine the evidence) (Op. A7).

The court of appeals failed to recognize that the *cross-examination* of defendant's witnesses was extensive. It has shown the lack of appreciation and understanding of the danger by the plaintiff. The cross-examination demonstrated the inadequacy of his training, instruction, and the lack of proper printed warnings on the machine. Further, in the cross-examination of defendant's chief engineer, plaintiff established the frequency with which an operator would be presented with parallel situations to that encountered by the plaintiff.

The criteria in deciding whether the plaintiff had assumed the risk of his own injury is a subjective one. It is a question of whether *he* knew, understood and *appreciated* the danger of injury at the moment he performed the questioned act. Further, it was an affirmative burden of the defendant to prove the plaintiff had assumed the risk by *unreasonably* acting as he did. It was plaintiff's object, and, indeed, it was attained to a significant degree, to establish during cross-examination that the plaintiff did not appreciate the risk involved and that he was not unreasonable in doing what he did under the circumstances.

This Court has long ago announced the principle that the defendant, himself, may provide the missing link for the plaintiff by presenting his defensive evidence after making a motion for directed verdict. In the case of *Bogk* v. *Gassett*, 149 U. S. 17, this Court considered a similar situation where a motion for directed verdict was made by defendant at the close of

plaintiff's case. After denial of the motion, the defendant put its evidence in on the merits. This Court stated:

> "It not infrequently happens that the defendant, himself, by his own evidence, supplies the missing link, and if not, he may move to take the case away from the jury upon the *conclusion of the entire testimony*." (Emphasis supplied)

It cannot be said here that the quantity of evidence by the defendant was inconsequential. The court of appeals acknowledges this to be true in its opinion. (Op. A6) It cannot be said that the quality of defensive evidence was overwhelmingly in defendant's favor. This is particularly true where the affirmative defense at issue was the plaintiff's state of mind, his appreciation of his danger, and his reasonableness in acting as he did. For the court to order judgment n.o.v. without a motion for directed verdict is to fail to adhere to the constitutionally limited role of the appellate court. The power of a reviewing court is to review a trial judge's ruling. It is not to re-examine evidence previously determined by the jury. In this case, there was no ruling on a motion for directed verdict at the close of all the evidence, because there was no motion made. This is true even if one accepts in full the affidavit of defendant's trial counsel. Thus, with no ruling to review, the court of appeals lacked the authority to re-examine the facts found by the jury and to enter judgment n.o.v.

B.

THE DECISION OF THE COURT OF APPEALS ENTERING JUDGMENT NOTWITHSTANDING THE VERDICT VIOLATES THE SEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AS IT IS A RE-EXAMINATION OF SPECIFIC FINDINGS OF FACT MADE BY THE JURY.

The issue on which the court of appeals reversed the judgment of the district court is its interpretation that the plaintiff had assumed the risk of his own injury *as a matter of law*. The burden of proving this defense according to the substantive law was upon the defendant. It was required to prove that plain-

tiff voluntarily, unreasonably, with knowledge and appreciation of the danger, proceeded in the face of that danger. The jury was instructed that, in determining whether the plaintiff had assumed the risk, they were to take into account his age, experience, training and ability to understand (including the fact that he spoke little English). This issue was submitted to the jury unconditionally in the form of instructions and in the special interrogatories. The jury, after having heard all of the evidence, viewing the witnesses and their manner of testifying concluded specifically that the plaintiff had not assumed the risk of his own injury. The facts which tend to show the plaintiff's understanding and appreciation are myriad. Whether the plaintiff was unreasonable in his conduct is also answered by viewing the totality of circumstances surrounding the event in question. *All of these elements are essentially factual in nature.*

This Court has on many occasions reaffirmed the doctrine that a determination of such factual questions is the historic constitutional province of the jury.

Tennant v. *Peoria*, 321 U. S. 29.

Lavender v. *Kurn*, 327 U. S. 645.

Rogers v. *Missouri Pacific*, 352 U. S. 500.

A & G Stevedores v. *Ellerman*, 369 U. S. 355.

Continental Co. v. *Union Carbide*, 370 U. S. 690.

The Supreme Court of Illinois, which has developed the substantive law of strict tort liability applicable to product safety cases, has also clearly announced that this issue is one for the jury. In the *Williams* v. *Brown* case, *supra*, the court held:

> "It must also be remembered that this (the issue of assumption of the risk) is ordinarily *a question to be determined by the jury*. That determination is not to be made solely on the basis of the user's own statements, but rather upon the *jury's assessment* of all of the facts established by the evidence . . ." (Emphasis supplied)

The court of appeals, in reversing the district court and disregarding the answer of the jury to the special interrogatory, has created a new and radical test to determine whether a plaintiff has assumed the risk. The court's philosophy is expressed in the opinion as follows:

> "Workmen often take risks which they should not take and are fortunate enough to avoid injury. In finding that Moran assumed the risk (we are dealing with) a hasty but nonetheless knowing decision . . . The test, although subjective, relates to knowledge of the risk and not to whether it was a good risk." (Op. A14)

Thus, the court has declared as *a matter of law* that *any* knowledge of an untoward function of the product, which the court may attribute to the plaintiff, will defeat his action. According to the opinion, this is true even though the extent and degree of danger is unappreciated and that the plaintiff's conduct may have been entirely reasonable under the circumstances. Thus, following this test a court would be allowed to withdraw the case from the jury and declare the affirmative defense of assumption of the risk proved as a matter of law.

This philosophy is directly contrary to the controlling decision in Illinois in the *Williams* case. In that case the court emphasized that the defense is essentially one for the jury to decide. The elements to be considered in determining whether the defense has been proved are his understanding of the risk and his appreciation of it interpreted in light of all of the circumstances, including the plaintiff's age, training and ability to understand. The court of appeals has further substituted its interpretation of the meaning of the evidence in contradiction to the jury's finding. The court has declared as a matter of law that an injured worker may not recover if he possesses *any knowledge* regarding the unsafe nature of industrial equipment. This decision emasculates the laudable goal of product safety laws developed by court decision in Illinois and many other jurisdictions. These decisions have observed the need for protection of workers and consumers—the potential users of defective and unsafe products.

The concept of product safety is one that has become increasingly recognized in our society. This recognition can be observed in the passage of legislation such as the Occupational Health and Safety Act, the Consumer Protection Act, the Flammable Fabrics Act, etc., by the Congress of the United States.

The test announced by the court of appeals will, if followed, allow a manufacturer of an unsafely designed and unreasonably dangerous product to remain essentially immune from any duty to compensate a person injured as a direct result of the condition of the product. It may be said that in most cases one can attribute *some* knowledge to a user of a defective product. This is especially so in an industrial setting where a worker may often be required to operate a particular, unsafe machine.

The court acknowledges here that the evidence of surrounding circumstances demonstrated that the plaintiff's act was a hasty one, where the extent and degree of danger may not have been appreciated by him. Nonetheless, the court of appeals disregarded the jury's finding and re-examined the evidence. It substituted its interpretation of the facts in direct conflict with the conclusion reached by the jury, and, thereby, violated plaintiff's right to trial by jury under the Seventh Amendment of the Constitution.

CONCLUSION.

For the reasons stated herein, petitioner prays that this Petition be granted and a Writ of Certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated December 6, 1973.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1972 — April Session, 1973

No. 72-1499

JUAN MORAN
Plaintiff-Appellee,
v.
THE RAYMOND CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ALEXANDER J. NAPOLI, *Judge.*

Argued April 26, 1973—Decided September 14, 1973

Before MOORE, *Senior Circuit Judge,** and CUMMINGS and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* Defendant, The Raymond Corporation (Raymond), appeals from a judgment for $250,000.00 entered on a jury verdict in favor of plaintiff, Juan Moran, on his complaint for personal injuries he had allegedly received while he was an employee of Central Steel and Wire Company (Central).

Raymond manufactured a lift truck, known as a sideloader, which was designed to operate in narrow aisles. It differs from the standard fork lift truck, on which the load is carried fully beyond the front wheels in that, as the name sideloader indicates, the load-lifter is located on one side of the equipment and

* Senior Circuit Judge Leonard P. Moore of the United States Court of Appeals for the Second Circuit is sitting by designation.

extends equidistant over the front and rear sets of wheels. At one end of the equipment there is located an operator's cage with the controls inside. Moran had operated a sideloader at Central for approximately three months. On the night in question, he was in the process of returning a tray to a rack approximately eight or nine feet above the ground when some wire rods on the tray slipped therefrom. In attempting to correct this situation, Moran left the operator's cage and first stood on the moveable forks and eventually on a platform below the forks. Still not achieving the desired result, he attempted to lower the forks but rather than returning to the cage and while standing on the platform on the lift side of the equipment, he reached through an opening into the cage and pulled the control lever to lower the forks. Although he tried to bring his hand back quickly, it became stuck because of a bandage he had on his wrist. When the cross bar came down with a shearing action, Moran's right arm was seriously injured.

Moran's complaint was based on both negligence and strict liability theories. Among Raymond's defenses were that the lift truck was not defectively manufactured (and therefore could not be the basis of a strict liability in tort claim), that Moran had assumed the risk, and that Moran had misused the sideloader so as to bar recovery as a matter of law. The jury rejected all of the defenses and answered special interrogatories finding no assumption of the risk or misuse.

Initially we must decide whether or not we can review the sufficiency of the evidence in this case. Defendant moved for a directed verdict at the close of plaintiff's case and the district judge took the motion under advisement. There is no indication in the record that the motion was renewed in writing at the time the presentation of the evidence was completed. Rule 50, Fed. R. Civ. P., provides in part that "[a] party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the

same extent as if the motion had not been made." "Nevertheless, the courts have adhered to the longstanding rule that the introduction of evidence at that point constitutes a waiver of the objection to the sufficiency of the evidence unless the motion is renewed at the time when all the evidence is in. What this means is that after the moving party has offered evidence: (1) the motion cannot serve as a necessary predicate for a motion for judgment under Rule 50(b); and (2) it cannot serve as the basis for attacking the sufficiency of the evidence in the appellate court. And this doctrine would appear to be applicable though the motion at the close of the opponent's case was reserved by the court rather than denied." 5A Moore, FEDERAL PRACTICE ¶ 50.05[1], at 2341-2 (2d ed.) (Footnotes omitted.)

9 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: *Civil* § 2536, at 593 (1971), states basically the same doctrine as follows:

> "It is thoroughly established that the sufficiency of the evidence is not reviewable on appeal unless a motion for directed verdict was made in the trial court. Indeed a motion at the close of plaintiff's case will not do unless it is renewed at the close of all the evidence nor will the appellate court review the sufficiency of the evidence if the trial court has denied a motion that does not state specific grounds." (Footnotes omitted.)[1]

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1. A further complication enters the picture at this point although not raised by the plaintiff. The written motion filed by defendant at the close of plaintiff's evidence did not specify any grounds. However, counsel in argument to the court before introducing any evidence made it abundantly clear that the defendant was relying on assumption of risk and misuse. An Illinois case bearing on the defense of assumption of risk, *William* v. *Brown Mfg. Co.*, 45 Ill. 2d 418 (1970), was cited to the court. Although Rule 50(a) Fed. R. Civ. P. requires that the motion shall state the specific grounds, the "rule does not require technical precision in stating the grounds of the motion. . . . Although it is said that the better practice is for the motion to be in writing, the rule makes no such requirement and an oral motion on the record will suffice. An oral statement

In an affidavit filed with his reply brief in this court, counsel for Raymond states that during an in-chambers but off-the-record conference with the district court judge he informed the judge that he had a motion for a directed verdict at the close of all of the evidence that he would like to have filed. Judge Napoli assertedly replied that the ruling on that motion would be the same as the ruling he made concerning the earlier motion for directed verdict, namely, that he would take it under advisement and that the ultimate ruling on both motions would be the same. 'Therefore, I did not file a written Motion for Directed Verdict at the close of all evidence." Judge Napoli, however, is deceased and in a counter-affidavit counsel for the plaintiff denies he was present at the purported conversation in chambers with the judge relating to a motion for a directed verdict at the close of all of the evidence. Defense counsel in his affidavit had indicated he was not certain whether plaintiff's counsel had heard the colloquy concerning a possible final motion for directed verdict.

The issue of whether we should consider this appeal as though a motion for directed verdict had been made at the close of all of the evidence becomes a close question because neither in argument on the defendant's post-trial motion, nor at any other time in the district court, did the plaintiff raise the question of lack of filing of this motion. Instead, at the time of the argument in the district court, plaintiff's counsel stated:

> "Under the applicable rules, the grounds for seeking a judgment notwithstanding the verdict must be identical and not expansive over theirs which were asserted in the motion for directed verdict at the close of the plaintiff's case, at the close of all the evidence, and upon which the Court has ruled on the 11th of April of this year."

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of grounds may serve a written motion that is too general." 9 Wright & Miller, *supra*, § 2353, at 580-1. (Footnotes omitted.) We hold, therefore, that the motion at the close of plaintiff's evidence was sufficient under Rule 50(a).

We do not view favorably the raising of an issue, particularly a technical one, for the first time on appeal. On the other hand, it is incumbent on counsel to make the record in the district court as to issues he wishes to present on appeal.

Raymond relies on two cases to support its contention that we are not foreclosed from examining the evidence in this case. In *United States* v. *353 Cases,* 247 F. 2d 473 (8th Cir. 1957), the Government had brought a condemnation action against allegedly misbranded mineral water. At the close of the defendant's case the Government moved for a directed verdict, which was not granted. The Government called two rebuttal witnesses and the claimants called one surrebuttal witness. None of these witnesses testified concerning the grounds for the motion for a directed verdict. The Government failed to renew the motion at the close of all of the evidence and the district court subsequently denied judgment notwithstanding the verdict relying, in part, on the failure to renew the motion for a directed verdict. The Eighth Circuit reversed, stating:

> "We think that as a practical matter the Government did all that was necessary to preserve for review the question whether it was entitled to a directed verdict. This Court, moreover, in the public interest and to guard against injustice, may, of its own motion, notice errors which have not been properly preserved for review, if such errors are obvious, or if they otherwise seriously affect the fairness and integrity of the judicial proceedings." 247 F. 2d at 477.

While not mindful of the pragmatic values reflected in the above language, we also note that the exception carved out is most narrowly stated and is certainly based in part on the fact that the rebuttal witnesses testified only on collateral issues.

The second case on which Raymond relies is *Bayamon Thom McAn, Inc.* v. *Miranda,* 409 F. 2d 968 (1st Cir. 1969). The case is somewhat similar to the one before us. The defendants had moved for a directed verdict at the close of the plaintiff's case and the district court had reserved its ruling. Defendants

then submitted eight exhibits, none of which dealt with the issue of negligence or contributory negligence, but failed to renew their motions for directed verdicts. The court held that the defendants had not waived their right to move for judgment notwithstanding the verdict. The court relied on two factors. First, the district court itself showed that it felt that the defendants had preserved their point:

> "[i]n a sense the court may well have led counsel reasonably to believe that all had been done that was necessary. . . . This factor alone would be of no avail to appellants had the evidence subsequently presented been previously unrevealed, lengthy, or relevant to the issues raised by the motions for a directed verdict. [Citation omitted.] But this part of the trial, occupying only two pages of transcript and involving no more than a few minutes, held no surprises." 409 F. 2d at 971-972.

The case before us is similar to *McAn* to the extent that there may have been implied assurances by the district court that the record was preserved. However, the defendant in the present case did introduce more than an inconsequential amount of testimony following its motion for a directed verdict at the close of the plaintiff's case. Six witnesses, including the plaintiff as an adverse witness, testified. Their testimony covers 110 pages of the transcript.

In the First Circuit's own construction of *McAn* in *Gillentine* v. *McKeand,* 426 F. 2d 717, 722 (1st Cir. 1970), it was emphasized that *McAn* was based on the fact that the evidence introduced by the defendant subsequent to its motion for a directed verdict, "could not conceivably alter the court's decision on a motion for a directed verdict."

Some status of ambivalency results from the emphasis on the extent of the evidence which comes in after the first motion for a directed verdict is overruled. On the one hand, if there is substantial evidence introduced by the defendant and the motion is not renewed, the trial judge may be deprived of the opportunity, which he should have, of determining whether there

was sufficiency of evidence, based on *all* of the evidence. "[T]he litigant who has not moved for a directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view." *Little* v. *Bankers Life & Casualty Company*, 426 F. 2d 509, 511 (5th Cir. 1970). Also we are not mindful that "[i]t not infrequently happens that the defendant himself, by his own evidence, supplies the missing link. . . ." *Bogk* v. *Gassert*, 149 U. S. 17, 23 (1893).

On the other hand, if on analysis the additional evidence, even though extensive, accomplishes what the defendant intended it should, i.e., strengthening his case without simultaneously exposing a flaw, little justification would seem to exist for finding significance in the quantitative aspect where the trial judge has reserved ruling on the first motion until after all evidence has been put in, and, at the time of ruling, the evidence and issues are no weaker from the viewpoint of the movant than those which would have been presented had the second motion been filed.

As a background for our further consideration of the narrow issue before us we note from our examination of the record that the defendant's evidence did not aid plaintiff's position that there was no assumption of risk. Indeed, when the plaintiff himself, as an adverse witness, was put on the witness stand, he admitted that when he had been instructed on how to run the machine, he had been told always to stand in the cage when operating the controls. He further stated that because he knew he would be hit if he did not get out of the way he had pulled the control fast and withdrawn his hand quickly.

We now turn to the procedural aspects of the record made in the district court to aid us in determining whether Raymond has forfeited the privilege of challenging the sufficiency of the evidence. We have already adverted to the statement made by plaintiff's counsel which, inferentially at least, supports the premise that the district court judge did consider, when he finally

overruled the motion for a directed verdict, that he was doing so on the basis of the sufficiency of all of the evidence.

On Friday, March 10, 1972, the plaintiff concluded his evidence and rested. Raymond's motion for directed verdict was filed. The judge said he would reserve ruling on it until after he had heard argument. On the following Monday, March 13, 1972, as previously noted herein, the counsel for Raymond argued that there were sufficient facts to constitute assumption of risk as a matter of law. Counsel for Moran argued that the question was for the jury.

> "The Court: [at the conclusion of the argument] All right. I am going to reserve my ruling. Let's go ahead."

At the conclusion of the evidence on March 13, the jury was excused and the judge had an unrecorded conference with counsel in chambers on instruction. It apparently was at this conference that the disputed colloquy concerning a final motion for directed verdict allegedly took place.

On the following day the court indicated it was going to go on the record in chambers with reference to the instructions "and everything we discussed after adjournment yesterday." The ensuing discussion concerned which of the tendered instructions would be given and which would be refused.

Moran objected to the giving of an instruction tendered by the defense because he did not believe that misuse was properly an issue although he agreed that assumption of risk was.

> "The Court: In our informal discussion last evening, outside the presence of the court reporter, we discussed these questions. The Court decided that both misuse and assumption of risk would be proper in this case. Therefore, the objection is overruled, and Defendant's tendered Instruction No. 6 will be given."

The record is not helpful at this point, therefore, in determining what exactly may have been said, if anything, at the unrecorded session on the matter of the filing of a final motion for a directed verdict. It is clear, however, that there was an

informal, unreported session, that the original motion for directed verdict which had been filed and argued had never been ruled on, and that the issue of assumption of risk was to be submitted to the jury.

The jury reached a verdict on the date of submission of the cause to it. On March 28, 1972, the causes was continued to April 11, 1972, for further ruling. On the latter date, defendant's motion for a directed verdict was denied and judgment was entered. On April 20, 1972, the defendant filed its motion for judgment notwithstanding the verdict or in the alternative for a new trial.

The following extracts are from that motion:

* * * * *

". . . and in support of this motion, in addition to those grounds stated in the Motion for Directed Verdict made at the close of all the evidence, states as follows:

* * * * *

11. As a matter of law, the plaintiff's use of the product at the time of the occurrence with full knowledge that he was in a position of danger, that there was a safer method by which he could have performed the function he was trying to perform and that he nevertheless proceeded with knowledge of the danger, constitutes assumption of risk which will bar a recovery of the plaintiff.

* * * * *

16. The Court erred in failing to direct a verdict for the defendant either at the close of the plaintiff's evidence or at the close of all the evidence."

At the inception of the argument, the judge asked counsel for Raymond whether all of the argument had not already been heard. Counsel replied that while the primary discussion before had been concerning assumption of risk, the motion raised a number of other matters which hadn't really been stressed before. After adverting to some of the new matters in the motion, counsel returned to an argument on assumption of risk. Counsel for Moran addressing himself first to the motion for judgment

n.o.v., objected to the consideration of any new matters not "asserted in the motion for directed verdict at the close of the plaintiff's case, at the close of all the evidence, and upon which the Court has ruled on the 11th of April this year." At no time was it suggested by counsel that the matter of assumption of risk was a new matter. Nor, more importantly, was there any intimation that the motion for judgment n.o.v. should not be entertained because a motion for directed verdict was not made at the close of all of the evidence. Yet, the authorities indicate that the filing of this motion at the completion of the evidentiary presentation is a requirement for consideration of the motion for judgment n.o.v. just as it is for appellate consideration of the sufficiency of the evidence on the denial of the motion for directed verdict, since the n.o.v. motion is technically only a renewal of the motion for directed verdict. 9 Wright Miller, *supra*, § 2537, at 596-8.

However, it also appears well established that the courts take a liberal view of what constitutes a motion for directed verdict in deciding whether there was a sufficient prerequisite for the motion for judgment. *Ibid.* at 596-7. The standard for granting the n.o.v. motion is the same as for the directed verdict motion. *Ibid.* at 599. It appears to us that the rationale of the liberality referred to in the text, *inter alia*, flows from the fact that when the n.o.v. motion is filed in the district court, there has been a presentation to the trial judge of the reasons for taking the case from the jury.

While the record is scanty, and it would have been helpful to have known all that transpired in the off-the-record conference, we are satisfied that the contentions of the defendant that it was entitled to a determination that there was assumption of risk as a matter of law was adequately presented to the trial judge at the necessary time. To reach any other result would be to enshrine form over substance. Accordingly, we turn to a consideration of the sufficiency of the evidence for the purpose

of determining the correctness of the district court's denial of judgment notwithstanding the verdict.

Under Illinois law, which is controlling on this aspect of the case, *Illinois State Trust Co.* v. *Terminal R. R. Ass'n of St. Louis,* 440 F. 2d 497, 500 (7th Cir. 1971), a judgment should be directed or entered n.o.v. "only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick* v. *Peoria & Eastern R. R. Co.,* 37 Ill. 2d 494, 510 (1967).

We do not have to determine whether Raymond is correct in its contention that its lift truck was not "defective" as that term is used to invoke the doctrine of strict liability in tort actions since we find it clear under the *Pedrick* test that Moran assumed the risk. The Illinois Supreme Court adopted the doctrine of strict liability in tort in *Suvada* v. *White Motor Co.,* 32 Ill. 2d 612, 210 N. E. 2d 182 (1965). In *Williams* v. *Brown Manufacturing Co.,* 45 Ill. 2d 418, 261 N. E. 2d 305 (1970), the court held that simple contributory negligence, which would bar recovery by a plaintiff in a tort action based on negligence, would not preclude recovery in a suit based on a strict liability theory, 45 Ill. 2d at 426.

The court held, however, "that a plaintiff who knows a product is in a dangerous condition and proceeds in disregard of this known danger (often termed 'assumption of risk') may not recover for resulting injuries." 45 Ill. 2d at 426.[2] The test which the jury was to apply was

> ". . . whether a user has assumed the risk of using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is *his* knowledge, understanding and appreciation of the danger which must be assessed, rather than that of the reasonably prudent person

2. The court also held that "plaintiffs who 'misuse' a product —use it for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant—may be barred from recovery." 45 Ill. 2d at 425.

(Restatement (Second) of Torts, § 496D, comment (c)), it must also be remembered that this is ordinarily a question to be determined by the jury. That determination is not to be made solely on the basis of the user's own statements but rather upon the jury's assessment of all of the facts established by the evidence. No juror is compelled by the subjective nature of this test to accept a user's testimony that he was unaware of the danger, if, in the light of all of the evidence, he could not have been unaware of the hazard (Restatement (Second) of Torts, § 496D, comments (d) and (e)); and the factors of the user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses, (Wade, Strict Tort Liability of Manufacturers, 19 Sw. L. J. 5 (1965), see *Pitts* v. *Basile*, 35 Ill. 2d 49) will all be relevant to the jury's determination of the issue, if raised." 45 Ill. 2d at 430-431. (Emphasis in original.)

This standard was reaffirmed by the Illinois Supreme Court in *Sweeney* v. *Max A. R. Matthews & Co.*, 46 Ill. 2d 64, 264 N. E. 2d 170 (1970).

Although the test of assumption of risk is a subjective one, depending on the knowledge of the injured party, it is apparent that the question need not always go to the jury. The language in *Williams, supra,* that the defense of assumption of the risk ordinarily presents a question to be determined by the jury while permitting the jury to disbelieve the injured party's testimonial denial of knowledge of the danger, even though the test is a subjective one, does not mean that a jury question is presented when the testimony is clear that he did know of the danger.

In *Fore* v. *Vermeer Manufacturing Co.*, 7 Ill. App. 3d 346, 287 N. E. 2d 526 (3rd Dist. 1972), the court affirmed the grant of summary judgment against the plaintiff when the plaintiff admitted in his deposition that he had had numerous past difficulties with the machine: "It appears to be clear that the plaintiff had actual knowledge of the danger; that he understood and appreciated the risk, and that he deliberately exposed himself to such risk, all while he was of full age, well experienced, with

complete knowledge and understanding, of an obvious defect, and an obvious danger." 287 N. E. 2d at 527-528. A similar result was reached in the affirmance of a directed verdict at the close of the plaintiff's evidence in *Denton* v. *Bachtold Brothers, Inc.*, 8 Ill. App. 3d 1038, 291 N. E. 2d 229 (4th Dist., 1972). Plaintiff has provided us with no contrary citation of authority.

If we now turn to Moran's own testimony and apply the Illinois standards for assumption of the risk, it becomes clear that Moran, on the testimony in this record, assumed the risk. Moran testified that he had been working at Central for approximately five months at the time of the accident. During the first two months he did not drive a sideloader. During the next three months, following a week of training including how to operate the machine, he had filled many orders daily, all with the help of a Raymond sideloader. Although at one point he testified that he had never been told not to operate the machine from outside the driver's cage, he later admitted that he had been instructed to stand in the cage "when you are operating the controls." He clearly knew that there was a substantial risk involved in working with the machine. Particularly, however, and most significantly, he recognized the danger in operating the machine in the way he was at the time he was injured since he testified that he knew the bar would hit him if he did not move out of the way: "That's why I pulled the control fast and I withdrew the hand quickly." The bar was about a foot and a half above his head when he pulled the lever to lower the forks.

While one who stands under the guillotine blade with knowledge of the fact that there will be a descent of the operational part upon activation of the controlling lever would scarcely seem to be in a position to claim that the blade fell faster than he anticipated, nevertheless, we find no support in the record for Moran's contention that the lowering speed of the sideloader he had been operating for several hours at the time of the accident was greater than was that of the sideloader he had previously operated.

By way of summary, Moran, standing out of the operator's cage in a position where he would be in the path of the equipment if it was caused to become operative, reached with some effort on his part into the control area and pulled the control lever down as far as it would go. He knew when he did that, the forks would start coming down and would go all the way to the bottom unless he pushed the lever back. This was clearly proven subjective evidence and the verdict, under the *Pedrick* test, cannot stand. Plaintiff argues that "[t]o say that Juan Moran consciously assumed the risk of his own injury would, under the circumstances, be to say that he intended to maim himself, or he was bent upon suicide." This conclusion does not follow. What is clear is that Moran was in a hurry and that he took a calculated risk that he could get his hand out of the way before the forks hit him. Workmen often take risks which they should not take and are fortunate enough to avoid injury. In finding that Moran assumed the risk, we are not dealing with the waiver of a constitutional right designed to protect fair trial, *cf. Schneckloth* v. *Bustamonte*, 41 U. S. L. W. 4726 (U. S., filed May 29, 1973), but rather with a hasty, but nonetheless knowing, decision. Obviously Moran, who had operated the machine from the front of the forks before without misadventure, *thought* he could do so again. But that is not the test applied in Illinois. The test, although subjective, relates to knowledge of the risk and not to whether it was a good risk. See *Fore* v. *Vermeer Manufacturing Co., supra,* and *Denton* v. *Bachtold Brothers, Inc., supra.*

For the reasons hereinabove set out, the judgment of the district court is reversed.

REVERSED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.